Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

DONALD G. FORD AND SANDRA H. FORD, PETITIONERS,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "interstate commerce" element of the federal money laundering laws, 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 1957, which cover transactions involving a "financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree," is satisfied merely by showing that the defendant deposited funds in a state-chartered bank insured by the FDIC.

2. Whether the court of appeals properly applied *Koon* v. *United States*, 518 U.S. 81 (1996), when it held, without considering the nature or severity of petitioner's conduct, that their conduct fell within the "heartland" of a federal sentencing guideline because it constituted the underlying criminal offense.

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PETITION FOR A WRIT OF CERTIORARI

Donald G. Ford and Sandra H. Ford respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-38a) is reported at 184 F.3d 566. The judgments and decisions of the district court (App., *infra*, 43a-59a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1999. On October 8, 1999, the court of appeals denied petitioners' requests for panel rehearing and suggestions of rehearing *en banc*. App., *infra*, 41a-42a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 1956, 1957, and 3553(b) are reproduced at App., *infra*, 57a-69a. United States Sentencing Guidelines ("U.S.S.G.") ch. 1, pt. A, and §§ 2S1.1, 2S1.2, and 5K2.0 are reproduced, in pertinent part, at App., *infra*, 70a-80a.

STATEMENT

This case presents the important and recurring question of whether the "interstate commerce" element of the federal money laundering laws, which requires that transactions involve a "financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree," can be satisfied simply by showing that a state-chartered financial institution was insured by the FDIC. This Court will decide this very question, in the context of the federal arson statute, in *Jones* v. *United States*, No. 99-5739. This case also provides an ideal opportunity for the Court to resolve the widespread confusion over how to apply the

"heartland" framework articulated by this Court in *Koon* v. *United States*, 518 U.S. 81 (1996).

A. In *Jones* v. *United States*, No. 99-5739, this Court agreed to resolve the sharp disagreements of the courts of appeals over the proper meaning of the "affecting commerce" element of federal criminal statutes. Applying a rule similar to that in *Jones*, the court of appeals below held that this element of the federal money laundering laws was automatically satisfied by evidence that the state-chartered institution in question was insured by the FDIC — even though there was no evidence that FDIC insurance ever was triggered or that the bank engaged in any interstate financial transactions. That holding, while in accord with decisions of the Fourth Seventh, Second and Tenth Circuits, irreconcilably conflicts with those of the Fifth and Eighth Circuits as well as a decision of another panel of the Second Circuit, which held that evidence of interstate insurance is insufficient to meet the interstate commerce requirements of analogous federal statutes.

This Court's decision in *Jones* will likely resolve this issue. The Court should thus await its disposition of the first question presented here pending its ruling in *Jones*. However, should *Jones* somehow fail to resolve this issue, the Court should grant the petition, which provides an ideal opportunity to resolve the long-standing split over whether interstate insurance, standing alone, meets the jurisdictional requirements of numerous federal laws that require proof of transactions affecting interstate commerce.

B. This case also presents an important and recurring question regarding the application of the framework set forth in *Koon* v. *United States*, 518 U.S. 81 (1996), for determining whether conduct falls outside the "heartland" of specific sentencing guidelines. The court of appeals, acknowledging a split among the courts of appeals, held that petitioners' conduct

fell within the heartland of the federal money laundering sentencing guideline simply because the conduct was covered by the money laundering laws they were convicted of violating. This deprived the trial court of the power to depart from that guideline, even though petitioners' conduct, *i.e.*, the deposit of funds in a state bank, was incidental to the underlying offense of operating a gambling enterprise (which is covered by a far less severe guideline), and despite the Sentencing Commission's 1997 Report to Congress confirming that the heartland of the money laundering guideline was meant to target drug enterprises and organized crime — not the sort of atypical "receipt and deposit" conduct here.

In holding that "heartland" departures are forbidden in money laundering cases so long as a defendant's conduct falls within the scope of the money laundering statute, regardless of the source of the funds, the Sixth Circuit followed the lead of the First and Eleventh Circuits. See *infra* at 15-16. The Second, Third, Fifth and Eighth Circuits, by contrast, have squarely rejected this categorical approach, holding instead that heartland departures are proper, even if a defendant's conduct is otherwise covered by the money laundering laws, so long as the conduct is incidental to the commission of another offense unrelated to drug trafficking or organized crime. See *infra* at 16 & cases cited therein.

The prejudice to petitioners resulting from this circuit split is readily apparent. Indeed, only seventeen days after writing the opinion *in this case*, Judge Gibson, sitting by designation in the Third Circuit, held that conduct materially identical to that alleged here fell *outside* the heartland of the money laundering guideline because it did not involve drug trafficking or organized crime. The diametrically opposite courses that Judge Gibson took in *Smith* and in this case

effectively *quadrupled* Mr. Ford's sentence and more than *doubled* Mrs. Ford's sentence.

As this case vividly demonstrates, the federal courts are hopelessly divided as to how to perform the heartland analysis called for by 18 U.S.C. § 3553, or how to apply the framework articulated by this Court in *Koon*. That such uncertainty and arbitrariness should permeate the application of the U.S. Sentencing Guidelines — a set of rules designed specifically to reduce uncertainty — is intolerable. Only by granting the petition can the Court resolve this confusion.

C. Petitioners were convicted and sentenced to prison terms of 108 and 41 months for running a bingo hall used to raise money for charitable organizations, including the Veterans of Foreign Wars, the Knights of Columbus and the American Legion. Based on petitioners' failure to comply with various technical requirements imposed by state law for running a charitable gaming operation, and their deposit of the gaming proceeds into a local state-chartered bank (as required by Kentucky law), petitioner Donald Ford was charged with two counts of conducting an illegal gambling business, in violation of 18 U.S.C. § 1955, twenty-nine counts of engaging in monetary transactions in criminally derived property, in violation of 18 U.S.C. § 1957, and four counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). His wife, petitioner Sandra Hutchins Ford, was charged with two counts of engaging in monetary transactions in criminally derived property based on her signing of two checks — checks also signed by Mr. Ford and that she did not even need to sign — as well as two counts of conducting an illegal gambling business. Petitioners never took any money from the bingo operation for their personal use.

To establish that petitioners violated the federal money laundering statutes (18 U.S.C. §§ 1956 and 1957), the

government was required to prove that the alleged transactions involved a "financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4)(B). To prove this element, the government relied entirely on the fact that the bank in which petitioners deposited proceeds of the bingo operations, the state-chartered Bank of Louisville, was insured by the FDIC. The district court, over petitioners' objection, instructed the jury that it could infer the requisite effect on interstate commerce from this fact. App., *infra*, 44a.

On November 22, 1996, the jury found Mr. Ford guilty on two § 1955 counts, twenty-six § 1957 counts, and one § 1956 count. The jury also found Mrs. Ford guilty on one § 1955 count and two § 1957 counts. Petitioners moved for acquittal on the money laundering counts based on the government's failure to prove that the bank had engaged in conduct affecting interstate commerce. The district court rejected this claim, holding that "proof that an institution is F.D.I.C. insured justifies the inference that there is an effect on interstate commerce." App., *infra*, 44a.

At their sentencing hearing, petitioners moved for a downward departure because their conduct fell outside the "heartland" of the money laundering guidelines. The district court held that it had no legal authority to depart downward because petitioners' conduct fell within the "heartland" of the money laundering guidelines. App., *infra*, 44a-49a. The court stated, however, that it would consider departing downward if the court of appeals held that petitioners' conduct fell outside the "heartland." App., *infra*, 48a, 56a. The court sentenced both petitioners at the bottom of the sentencing range. App., *infra*, 53a, 56a-57a.

Petitioners appealed their convictions to the Sixth Circuit, arguing, *inter alia*, that they should have been acquitted

of all money laundering counts based on the government's failure to prove the interstate commerce element. The court of appeals rejected this contention on the ground that "use of federally insured banks * * * to facilitate the money laundering create[s] a sufficient nexus to commerce to allow application of § 1956." App., *infra*, 28a (quoting *United States* v. *Owens*, 159 F.3d 221, 226 (6th Cir. 1998), cert. denied, 120 S. Ct. 56 (1999)).

Petitioners also challenged the district court's holding that petitioners' conduct fell within the heartland of the money laundering guideline.[1] As in the district court, petitioners argued that the money laundering statutes were aimed at combating the use of financial transactions to conceal proceeds of drug and organized crime operations, and that their conduct (which involved no such activity) was therefore atypical of that which the guideline targeted, thus empowering the district court to consider a downward departure. Petitioners also cited the Sentencing Commission's 1997 *Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report* (United States Sentencing Comm'n, (Sept. 18, 1997)), which confirmed that the heartland of the money laundering guideline was meant to "penalize the conduct about which Congress seemed most concerned when it enacted the money laundering statutes," *i.e.*, "situations in which the 'laundered' funds [were] derived from serious underlying criminal such as a significant drug trafficking operation or organized crime." Pet. C.A. Br. 42.

While acknowledging contrary decisions from other circuits, the court of appeals affirmed petitioners' sentence.

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[1] Petitioners argued in the court of appeals that if "Appellants' alleged conduct, if an offense at all, fell under the gambling guideline, U.S.S.G. § 2E3.1." Pet. C.A. Br. 44.

Joining the Eleventh Circuit in *United States* v. *Adams*, 74 F.3d 1093, 1101-1102 (11th Cir. 1996), the Sixth Circuit held that petitioners' conduct, *i.e.*, the documented depositing into a local bank of bingo proceeds, could not support a downward departure as a matter of law because the money laundering statutes punish more than "classic money laundering." App., *infra*, 35a (internal quotations omitted). The court of appeals also refused to consider the Sentencing Commission's 1997 Report to Congress on the ground that under 18 U.S.C. § 3553(b), courts can consider only "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission . . . when determining whether a factor was adequately taken into consideration" by the Sentencing Commission. App., *infra*, 36a. Because the Sentencing Commission's report did not fit into any of these categories, the court held that it could not be considered in making a heartland determination. The court also held that application of the money laundering guideline to cases not involving drugs or organized crime was already taken into consideration by the Sentencing Commission, and petitioners thus could not be eligible for a heartland departure "*merely* because [their conduct] involves gambling proceeds." App., *infra*, 36a (emphasis in original). The court of appeals thus affirmed the district court's finding that it lacked legal authority to depart from the money laundering guideline. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S HOLDING THAT FDIC INSURANCE ALONE IS SUFFICIENT TO SATISFY THE INTERSTATE COMMERCE ELEMENT OF THE MONEY LAUNDERING LAWS RAISES IMPORTANT QUESTIONS OF LAW OVER WHICH THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The decision below raises the fundamental question of whether proof of interstate insurance (in this case FDIC

insurance) *by itself* is sufficient to establish the interstate commerce element of the federal money laundering laws. This Court has granted certiorari to decide a similar question in *Jones* v. *United States*, No. 99-5739, and thus should hold the petition as to the first question presented pending its ruling in *Jones*. Should *Jones* fail to resolve that question, this case provides an ideal opportunity to put this vitally significant and broadly applicable controversy to rest.

A. The Courts Of Appeals Are Deadlocked As To Whether Proof Of Interstate Insurance Alone Is Sufficient To Establish Conduct "Affecting Interstate Commerce."

This case, like *Jones* v. *United States*, No. 99-5739, involves a sharp circuit split over the proper interpretation of the "affecting commerce" element used in numerous federal criminal statutes. Like the federal arson statute in *Jones*, the money laundering statute requires that the alleged money laundering activity involve an institution which is "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1956(c)(4)(B). See also 18 U.S.C. § 844(i) (arson statute requiring that property be used "in interstate or foreign commerce" or "in any activity affecting interstate or foreign commerce").

Federal courts have divided over laundering and the arson contexts, to determine whether interstate insurance alone is sufficient to make the insured bank or property "in" or "affecting" interstate commerce. The court below, like the Fourth, Seventh and Tenth Circuits, held that the statutory language of "affect[ing] interstate * * * commerce" is satisfied merely by proof of interstate insurance. App., *infra*, 28a (interstate insurance sufficient). See also *Jones* v. *United States*, 178 F.3d 479, 480 (7th Cir.) , cert. granted, 120 S. Ct. 494 (1999) (No. 99-5739); *United States* v. *Kunzman*, 54 F.3d

1522, 1527 (10th Cir. 1995) (same); *United States* v. *Peay*, 972 F.2d 71, 74-75 (4th Cir. 1992) (same). The Second, Fifth and Eighth Circuits, by contrast, have held that proof of interstate insurance is insufficient to establish that the insured bank or property is "in" or "affecting" interstate commerce. See, *e.g.*, *United States* v. *Johnson*, 194 F.3d 657, 662 (5th Cir. 1999); *United States* v. *Voss*, 787 F.2d 393, 397 (8th Cir. 1986); *United States* v. *Barton*, 647 F.2d 224, 232 (2d Cir. 1981).[2]

The circuit split over the sufficiency of interstate insurance as establishing the "affecting commerce" element in federal criminal statutes likely will be resolved in *Jones* v. *United States*. The lower court in *Jones* rested its "affecting commerce" finding on proof of not only interstate insurance, but also the receipt of natural gas and electricity. *Jones*, 178 F.3d at 480. To the extent that the government failed to prove that the arson in *Jones* "affected commerce," the government's reliance on even slimmer proof here — interstate insurance alone — must also fail. Indeed, the petition for a writ of certiorari in *Jones* specifically argued that "[r]esolution of the question [in that case] could affect the application of [other] statutes" — specifically mentioning 18 U.S.C. § 1956. See Pet. for Cert., *Jones* v. *United States*, No. 99-5739, at 23. Because

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[2] The government previously has attempted to downplay this circuit split by positing a distinction between interstate insurance by the FDIC and interstate insurance by private insurers. See, *e.g.*, *Peay*, 972 F.2d at 74-75. But this distinction is untenable. All that was required or proven here, as in the arson cases like *Jones*, was the simple fact of interstate insurance. Indeed, the government here offered no evidence whatsoever that the state-chartered bank engaged in any interstate transactions, that money ever crossed state lines, or that any claim was ever made by the bank on the FDIC insurance fund. To the extent that being insured by the FDIC (which paid no claim here) could ever cause greater effects on interstate commerce than insurance by an out-of-state insurer, no such proof was required by the courts below. See App., *infra*, 26a-28a.

this Court's ruling in *Jones* will likely govern the correctness of the interstate commerce holding below, the Court should, at a minimum, hold this portion of the petition pending its decision in *Jones*, and then rule on the petition accordingly.

B. The Sixth Circuit's Interstate Commerce Holding Conflicts With This Court's "Interstate Commerce" Decisions.

The Sixth Circuit's holding that FDIC insurance alone is sufficient to satisfy the "affecting commerce" element of the federal money laundering statutes cannot be squared with this Court's long-standing rulings concerning the meaning of such federal jurisdictional requirements.

As this Court has repeatedly explained, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this case, the statutory text of the money laundering laws makes clear that the financial institution at issue must do more than maintain passive connections with interstate commerce. Instead, the government must prove that the financial institution actually "engaged in" or has "activities * * * which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4)(B). The language here is virtually identical to language in other statutes which this Court has construed as requiring goal-oriented, instrumental conduct, not mere passive receipt of insurance. See, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 757 (1982) (retail and wholesale sale of electrical services "affects" interstate commerce); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) (coal mining "affects" interstate commerce); *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (extortionate credit transactions "affect" interstate commerce).

The court of appeals below did not require the government to prove that any funds moved across state lines, that FDIC officials or other banks were affected by the alleged money laundering, or that the depositing of funds by petitioner had any effect that extended beyond the state-chartered Bank of Louisville. Plainly, the basis of the court's theory is that the mere fact of insurance from the federal government alone is enough to "affect" commerce. This novel theory not only stretches the term "affect" to the breaking point, but also eviscerates the terms "engaged in" and "activities." "Judges should hesitate * * * to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994). In drafting the money laundering statutes, Congress specifically chose to include an "affecting commerce" requirement, and that choice must be respected.

The petitioner in *Jones* similarly argues in his merits brief that passive receipt of services, including insurance services, cannot be reconciled with the active involvement in commerce that Congress chose to require when it employed the terms "activity affecting interstate or foreign commerce." Pet. Br., *Jones* v. *United States*, No. 99-5739, at 17-27 (quoting 18 U.S.C. § 844(a)). This Court's resolution of the statutory issue in *Jones* will necessarily affect the interpretation here of an almost identical provision. Compare 18 U.S.C. § 844(i) (property must be used "in interstate or foreign commerce" or "in any activity affecting interstate or foreign commerce") (arson), with 18 U.S.C. § 1956(c)(4)(B) (financial institution must be "engaged in, or the activities of which affect, interstate or foreign commerce") (money laundering). Accordingly, this Court should hold this portion of the petition pending its decision in *Jones,* and then rule on the petition accordingly.

C. The Sixth Circuit's Interstate Commerce Holding Raises Important and Recurring Questions of Law That Merit Supreme Court Review.

This Court already implicitly recognized the importance of resolving the meaning of the terms "activities . . . affect[ing] interstate or foreign commerce" when it granted the petition for a writ of certiorari in *Jones*. As explained in the *Jones* petition, the significance of this question lies in the fact that numerous other federal criminal statutes — including the money laundering statute at issue here — contain similar "in or affecting commerce" requirements. See Pet. Br., *Jones* v. *United States*, No. 99-5739, at 23 & n.9, citing, *inter alia*, 15 U.S.C. § 1173 (requiring the registration of "any person engaged in the business of manufacturing gambling devices if the activities of such business in any way affect interstate or foreign commerce"); 18 U.S.C. § 922(g)(1) (prohibiting possession of firearms or ammunition "in or affecting commerce"); 18 U.S.C. § 1951(a) (barring use of robbery or extortion to "obstruct[], delay[], or affect commerce"); 18 U.S.C. § 1962 (prohibiting the use of income derived from a pattern of racketeering or collection of an unlawful debt for investment in an enterprise "the activities of which affect [] interstate * * * commerce").

Like *Jones*, this case reflects the increased federalization of criminal law — not merely through new statutes, but through "remarkably expansive" applications of the jurisdictional elements in existing statutes. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 701 (1996). This increased federalization of crime has significant practical consequences with the criminal caseload in federal courts having doubled since 1980. Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, at 13 n.2 (1999); Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving*

the Federal Judiciary from the Federalization of State Crime, 43 U. KAN. L. REV. 503, 505 (1995).

This Court has granted review in *Jones* to consider the expansive reading of the arson statute's "affecting commerce" provision. If it determines, as petitioners in *Jones* suggest, that the government's interpretation of "affecting commerce" is overly broad, this finding should serve as a corrective measure for other interpretations of similar federal criminal statutes. Certainly such a holding would affect the lower courts' broad application of federal money laundering statutes to allow the federal government to prosecute crimes against state banks without requiring *any* actual effect on interstate commerce. Should the Court's ruling in *Jones* fail to resolve this issue, this case provides an ideal vehicle to resolve this important and long-standing controversy. In any event, the Sixth Circuit's interstate commerce holding must be reversed.

II. THE COURT OF APPEALS' HOLDING THAT PETITIONERS' CONDUCT FALLS WITHIN THE HEARTLAND OF THE MONEY LAUNDERING GUIDELINE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

A. The Courts Of Appeals Are Deeply Divided Over The Legal Standard For Determining Whether Conduct Falls Within The Heartland Of Specific Sentencing Guidelines.

Although sentencing judges are required to sentence offenders in accordance with the Sentencing Guidelines, they may depart from the Guidelines if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Guidelines deal with atypical cases that

fall within the literal reach of specific guidelines by authorizing what are known as "heartland" departures:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

1996 U.S.S.G. ch.1, pt. A, intro. comment 4(b). See also 1996 U.S.S.G. § 5K2.0.

In *Koon* v. *United States*, 518 U.S. 81 (1996), this Court described the process that courts must follow when considering whether to depart downward from the sentence dictated by the applicable sentencing guideline.

> [A] sentencing court considering a departure should ask the following questions:
> (1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
> (2) Has the Commission forbidden departures based on those features?
> (3) If not, has the Commission encouraged departures based on those features?
> (4) If not, has the Commission discouraged departures based on those features?

Koon, 518 U.S. at 95 (quoting *United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)). The Sentencing Commission has prohibited consideration of only a few factors (none of which are applicable here). Otherwise, sentencing courts are free to depart based on factors not adequately taken into account

by the Sentencing Commission when it formulated the guideline in question. If a factor is unmentioned in the Guidelines, the court must, "after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' [*Rivera*, 994 F.2d at 949], decide whether it is sufficient to take the case out of the Guideline's heartland." *Koon*, 518 U.S. at 96.

In affirming petitioners' sentences, the court of appeals acknowledged that the circuits are split over the basic question of how to perform the "heartland" analysis articulated in *Koon*. The court also recognized that the circuits have split over whether money laundering activity falls outside the heartland of the money laundering guideline if it does not involve the concealment of drug trafficking or organized crime proceeds. In holding that such conduct falls within the heartland, the Sixth Circuit followed similar decisions of the First and Eleventh Circuits, both of which held that district courts lack legal authority to depart from the money laundering guidelines even where the conduct in question does not qualify as "classic money laundering." App., *infra*, 35a (citing *United States* v. *Adams*, 74 F.3d 1093, 1102 (11th Cir. 1996); *United States* v. *LeBlanc*, 24 F.3d 340, 346-347 (1st Cir. 1994)).

The holdings of the First, Sixth and Eleventh Circuits irreconcilably conflict with rulings of the Second, Fifth and Eighth Circuits, each of which have held that conduct (like petitioners') falls outside the heartland of the money laundering guideline if the funds were merely deposited with a financial institution and were not procured through drug trafficking or organized crime. App., *infra*, 34a (citing *United States* v. *Woods*, 159 F.3d 1132, 1134-1135 (8th Cir. 1998); *United States* v. *Hemmingson*, 157 F.3d 347, 361-363 (5th Cir. 1998); and *United States* v. *Caba*, 911 F. Supp. 630 (E.D.N.Y. 1996), *aff'd*, 104 F.3d 354 (table), 1996 WL 685764, at *3 (2d Cir. Nov. 29, 1996)). See also *United States* v. *Skinner*, 946 F.2d

176, 179-181 (2d Cir. 1991) (money laundering conduct resembling petitioners' alleged conduct here fell outside the heartland of the money laundering guideline). Contrary to the categorical approach adopted by the First, Sixth and Eleventh Circuits, the Second, Fifth and Eighth Circuits reflect a heartland framework that requires district courts to evaluate the typicality of each defendant's particular conduct.

That the circuits are so confused over how to determine whether specific conduct falls within the heartland of a sentencing guideline — in particular, whether such determinations should be made by examining the defendant's particular conduct rather than by looking to the literal reach of the statute of conviction — is untenable. The Sentencing Guidelines are meant to bring consistency and reason to the federal sentencing process. See *Koon*, 518 U.S. at 92 (discussing the legislative history of the Sentencing Reform Act of 1984). Although *Koon* went a long way toward bringing rationality and consistency to departure cases, it is clear that confusion still pervades the courts of appeals, and therefore that further Supreme Court review is necessary to clarify precisely how the heartland framework articulated in *Koon* is to be applied.

Had petitioners been sentenced in the Second, Fifth or Eighth Circuits, they clearly would have been eligible for a guideline departure. Mr. Ford's conduct under § 1957 consisted of twenty-three transactions involving $1,137,338.12. C.A. J.A. 1573. Other courts of appeals have authorized heartland departures from the money laundering guideline in "receipt and deposit" cases involving far greater amounts where the funds were not derived from drug trafficking or organized crime.[3] In

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[3] "Receipt and deposit" cases are "those in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a

Caba, for instance, the Second Circuit affirmed a downward departure in a case involving the deposit of *over $11 million* in food stamps in connection with a scheme to defraud the food stamp system. *Caba*, 911 F. Supp. at 632, *aff'd*, 104 F.3d 354 (table), 1996 WL 685764, at *3 (labeling the district court's decision to depart "exactly the kind of analysis of typical cases encouraged by the Guidelines"). As in *Caba*, Mr. Ford's transactions were thoroughly documented, confirming that there was never any attempt to conceal the source of any funds. See *Caba*, 911 F. Supp. at 636-637.

The prejudice to petitioners is even more glaring in Mrs. Ford's case. Mrs. Ford was convicted of signing two checks — checks for which her signature was not even required — totaling $94,000. App., *infra*, 30a. In *United States* v. *Smith*, 186 F.3d 290, 299-300 (3d Cir. 1999), a case decided a mere seventeen days after the opinion below, the Third Circuit (with Judge Gibson, *the author of the opinion below,* on the panel) reversed the trial court's refusal to consider a downward departure because the defendant's conduct — *i.e.*, depositing *fifteen* checks totaling $120,000 (more than *seven times* the number Mrs. Ford was convicted of signing) and the attempted concealment of the source of the funds (which petitioners never were accused of) — fell outside of the heartland of the money laundering guideline because "the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime," and because the sending of the checks there was only an "incidental by-product"

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financial institution account identifiable to the person who committed the underlying offense." *Woods*, 159 F.3d at 1135. See also H.R. Rep. No. 104-272, at 14-15 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 348-49 (describing "the application of the current guidelines to receipt-and-deposit cases" as potentially "problematic" and as "past sentencing anomalies arising from relatively few cases").

of the underlying conduct. Here, it is equally clear that petitioners' conduct had nothing to do with "drug trafficking" or "serious crime," and that petitioners' receipt and deposit of funds, not to mention Mrs. Ford's mere signing of two checks, was only incidental to petitioners' bingo operation.[4]

Furthermore, the defendant in *Smith* attempted to conceal the true source of the funds. Here, by contrast, even the government's own witness testified that petitioners' transactions were well-documented and showed no effort to conceal — a factor that courts often have used in determining whether conduct falls within the heartland of the money laundering guidelines. See *Caba*, 911 F. Supp. at 636-637 (deposit of over $11,000,000 in mishandled food stamps outside of the heartland because no intent to conceal the source of the funds); *United States* v. *Threadgill*, 172 F.3d 357, 377-378 (5th Cir.) (laundering of $500,000 atypical because the laundering was incidental to defendant's underlying gambling actives), cert. denied, 120 S. Ct. 172 (1999).

The foregoing circuit split has developed because the courts of appeals have disagreed not only as to the *framework* for conducting a heartland analysis, but also over the *sources* that trial courts can consider in making heartland determinations. In this case, petitioners argued below that their conduct fell outside the heartland of the money laundering guideline based in part on the Sentencing Commission's *Report to the Congress: Sentencing Policy for Money Laundering*

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[4] That Mrs. Ford's conduct falls outside the heartland of the money laundering guidelines is also confirmed by the fact that her signatures were legally irrelevant to the negotiability of the checks. Mr. Ford also signed the checks for which Mrs. Ford was convicted, and because the checks were for more than $2,000, Mr. Ford's signature was both necessary and sufficient under the account on which they were drawn to make them valid. See *United States* v. *Skinner*, 946 F.2d 176, 179-180 (2d Cir. 1989).

Offenses, including Comments on Department of Justice Report (Sept. 18, 1997). This Report confirmed that the heartland of the money laundering guidelines was meant to "penalize the conduct about which Congress seemed most concerned when it enacted the money laundering statutes" — in particular, "situations in which the 'laundered' funds [were] derived from serious underlying criminal activities such as a significant drug trafficking operation or organized crime," and cases where the financial transactions were undertaken to "make it appear that the funds were legitimate." See Pet. C.A. Br. 42.

Some courts of appeals, like the Third, Fifth and Eighth Circuits, have relied prominently on this Report in ascertaining the "heartland" of the money laundering guideline. See, *e.g.*, *Woods*, 159 F.3d at 1135-1136; *Hemmingson*, 157 F.3d at 363 n.18. Indeed, the Third Circuit in *Smith* explicitly relied on the Sentencing Commission's Report as having "explained the heartland of the money laundering guideline." 186 F.3d at 300. The Sixth Circuit below, however, held that the Report was irrelevant to the heartland determination because, under 18 U.S.C. § 3553(b), courts can only consider the "guidelines themselves, the official commentary, and the policy statements" in making heartland determinations. App., *infra*, 36a.[5]

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[5] The Sixth Circuit's holding that courts may only consider the sources enumerated in § 3553(b) when making heartland determination clearly conflicts with the practices of other circuits, which routinely consider a wide variety of sources in evaluating heartland claims. In the money laundering context, for instance, there are a myriad of sources considered by other circuits that the Sixth Circuit would exclude from the heartland analysis. See, *e.g.*, *Woods*, 159 F.3d at 1135-1136 (considering the Sentencing Commission's Sept. 17, 1997 report, H.R. Rep. No. 104-272, at 14-15, reprinted in 1995 U.S.C.C.A.N. 335, 348-349 (the report of the House committee recommending rejection of the Sentencing Commission's proposed amendments to the money laundering guidelines contained in the Sentencing Commission Report), and *Report for the Senate and House Judiciary*

The impact of this conflict on petitioners is especially severe. Indeed, only two weeks after writing the opinion below holding that the Sentencing Commission's 1997 Report was categorically irrelevant to the heartland question, Judge Gibson[6] joined in the Third Circuit's decision in *Smith*, 186 F.3d at 297-300, which held that the defendant's money laundering activity fell *outside* the heartland of the money laundering guideline and *prominently relied* upon the Sentencing Commission's Report and other sources not listed in 18 U.S.C. § 3553(b) — the very sources *expressly forbidden* by the Sixth Circuit.[7]

Had petitioners been prosecuted in a circuit where materials such as the Sentencing Commission Report could be considered, it is virtually certain that a district court would have recognized its legal authority to depart. In *Smith*, for instance, the Third Circuit concluded that the defendant, whose offense was far more serious than Mrs. Ford's, was eligible for a heartland departure because the defendant's conduct did not

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Committees on the Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money Laundering, Dep't of Justice (June 17, 1996) (a Department of Justice report on how it makes money laundering charging decisions)); *Hemmingson*, 157 F.3d at 362 (relying on Dep't of Justice, FEDERAL PROSECUTION OF ELECTION OFFICERS (6th ed. 1995)).

[6] Judge Gibson, author of the opinion below and member of the Third Circuit panel in *Smith* was sitting by designation in both cases. His home circuit, the Eighth is aligned with the Third Circuit on this issue, and the *Smith* panel, in reaching its holding, relied heavily on the Eighth Circuit's opinion in *Woods*. See *Smith*, 186 F.3d at 299.

[7] Like the Eighth Circuit in *Woods*, the Third Circuit in *Smith* also looked to the House Report recommending rejection of proposed amendments by the Sentencing Commission and the June 17, 1996 report written by the Department of Justice, as well as another document issued by the Sentencing Commission, News from the U.S. Sentencing Commission, "Money Laundering Guidelines Scrutinized" (Jan. 1998). See *Smith*, 186 F.3d at 298-299.

involve funds derived from "drug trafficking or serious crime." *Smith*, 186 F.3d at 298 (also noting the imposition of severe sentences for "money laundering conduct [] so attenuated as to be virtually unrecognizable as the type of conduct for which the original money laundering sentencing guidelines were drafted." (quoting the Sentencing Commission Report at 6-7)).

The Sentencing Guidelines were promulgated to avoid such arbitrary outcomes. In any event, the fact that courts of appeals could reach such completely inconsistent results on the purely legal question of whether a district judge has the *authority* to depart from application of a sentencing guideline — a question that served to *double* Mrs. Ford's sentence and *quadruple* Mr. Ford's sentence — is plainly intolerable, and can only be resolved by this Court's review.

B. The Court Of Appeals Applied The Wrong Legal Standard And Analysis In Holding That Petitioners' Conduct Fell Wihtin The Heartland Of The Federal Money Laundering Guideline.

The Sixth Circuit held that petitioners' conduct fell within the heartland of the federal money laundering guideline simply because the statute they were convicted of violating, 18 U.S.C. § 1957, covers more than "classic money laundering."[8] The court also refused to consider any source not listed in 18 U.S.C. § 3553(b) in making its heartland determination, including the Sentencing Commission's 1997 Report to Congress, which specifically described the scope of the heartland of the money laundering guidelines. App., *infra*, 35a-

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[8] Mr. Ford was also convicted of violating 18 U.S.C. § 1956(a)(1)(B), but the value of the funds relevant for Mr. Ford's § 1957 conviction increased his offense level to the point of exceeding the level applicable to his § 1956 conviction.

36a. In so doing, the court plainly misapplied this Court's decision in *Koon* v. *United States*, 518 U.S. 81 (1996).

1. The Court explained in *Koon* that the deferential standard of review given to sentencing courts derives from the intensely factual nature of the "heartland" inquiry:

> Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases.

Id. at 98. *Koon* reiterated the importance of considering the facts of each case in determining whether a particular factor is present to an unusual degree: "The relevant question is not, as the Government says, 'whether a particular factor is within the "heartland"' as a general proposition but whether the particular factor is within the heartland *given all the facts of the case.*" *Id.* at 99-100 (emphasis added).

In this case, however, the Sixth Circuit made its determination of whether petitioners were eligible for a heartland departure not by referring to the facts of their case, or by comparing the nature and gravity of their conduct to that which Congress targeted when it enacted the money laundering statutes. Instead, the court conducted the heartland inquiry as a matter of law, holding petitioners' conduct fell within the heartland of the money laundering statutes because those laws extended beyond "classic money laundering," and that petitioners' conduct did not fall outside the heartland of the money laundering guideline "*merely* because it involves

gambling proceeds." App., *infra*, 36a (emphasis in original).[9] But asking generically whether the deposited proceeds came from "gambling" completely misses the point of the heartland analysis. The question under *Koon* is whether petitioners' *specific conduct* fell within the heartland of the guideline — a point that was altogether ignored by the court of appeals.

The Sixth Circuit's approach may have been motivated by a fear that giving the district court authority to consider a heartland departure would negate the effect of the money laundering conviction. But that is exactly what heartland departures are for; if the sentencing court determines that an offender's conduct does not fit within the typical conduct targeted by the guideline, it negates the impact of the conviction to which the guideline would otherwise apply. See *Smith*, 186 F.3d at 300 (reversing application of the money laundering guideline and ordering application of the guideline for the underlying activity on remand). The Sixth Circuit's categorical prohibition against such sentencing adjustments would preclude heartland departures altogether regardless of the offender's particular conduct. To say that an offender's conduct has been *criminalized* says nothing of whether that conduct falls outside the heartland of the cases envisioned by the Sentencing Commission. Indeed, the offender's conduct *must* have been criminalized in order to trigger the sentencing process in the first place. As the Fifth Circuit recently explained in affirming the downward departure from the money laundering guideline:

> The government's argument amounts to a claim that the money-laundering statute facially applies

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[9] The Sixth Circuit is not alone in employing this sort of flawed and overly simplistic analysis. See also *LeBlanc*, 24 F.3d at 346 (reversing a departure because the "language of the statute * * * indicates that Congress intended to criminalize a broad array of transactions designed to facilitate numerous federal crimes"); *Adams*, 74 F.3d at 1102.

> to the defendants' conduct—a point no one contests. As such, the government's challenge fails to engage the fundamental premise of the district court's reasoning: that Hemmingson's and Ferrouillet's conduct, when viewed alongside the conduct that is usually prosecuted under the money-laundering statutes, was atypical.

Hemmingson, 157 F.3d at 362.

This Court's decision in *Koon* was crafted to eliminate rules that would prevent a sentencing court from evaluating the facts and circumstances of each offender's particular conduct. Notwithstanding *Koon*, the Sixth Circuit decided that petitioners' conduct fell within the heartland simply because the application note to those guidelines "references section 1961(1) [the definitional statute], which includes operation of a gambling business." App., *infra*, 34a. All that this shows, however, is that petitioners' alleged conduct was covered by the underlying criminal statute. The fact that petitioners' conduct is covered by the money laundering statute, however, is only the beginning of the heartland inquiry, not the end.

By defining the "'heartland,' a set of typical cases embodying the conduct that each guideline describes" (1996 U.S.S.G. ch.1, pt. A, intro. comment 4(b)) simply by reference to the elements of the underlying offense, the Sixth Circuit (and the other courts of appeals that it followed) simply ignored the fundamental holding of *Koon* that the "relevant question" is "whether the particular factor is within the heartland given all the facts of the case." 518 U.S. at 99-100.

2. To lie beyond the "heartland" of a statute or guideline, an offender's conduct must be "atypical" of the conduct that the Sentencing Commission considered in formulating the guideline. *Koon*, 518 U.S. at 94 ("Atypical

cases were not 'adequately taken into consideration,' and factors that may make a case atypical provide potential bases for departure") (quoting 1995 U.S.S.G. § 5K2.0). It is this determination that governs the sentencing court's power to authorize a downward departure. 18 U.S.C. § 3553(b); 1996 U.S.S.G. § 5K2.0.

It follows, then, that in heartland cases it is critical for sentencing and reviewing courts to evaluate a defendant's particular conduct to determine "whether the misconduct that occurred in the particular instance suffices to make the case atypical." *Koon*, 518 U.S. at 100. District courts are uniquely situated to make such a determination, "informed by [their] vantage point and day-to-day experience in criminal sentencing." *Id.* at 98.

It is therefore remarkable that the Sixth Circuit would deny sentencing courts access to a wide variety of relevant sources in helping them make the critical typicality determination. In this case, the Sentencing Commission's 1997 Report provides unmistakable guidance concerning the conduct that falls withiin the heartland of the money laundering guideline. Indeed, other circuits have looked to this Report for precisely that reason. See, *e.g.*, *Smith*, 186 F.3d at 299-300; *United States* v. *Anderson*, 82 F.3d 436, 440 (D.C. Cir. 1996) (report by the Sentencing Commission was similar to "a report by a learned society").[10]

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[10] This case is in a completely different posture than was the case in *Braxton* v. *United States*, 500 U.S. 344, 347-49 (1991). In *Braxton*, this Court refused to review one of Braxton's issues because, since the time this Court granted certiorari, the Sentencing Commission had requested public comment on the Guideline at issue. *Id.* at 348. The guidelines at issue here are at the opposite extreme; the Commission already attempted to alter and clarify them, but failed. Indeed, since the publication of the Commission's 1997 Report to Congress, the circuit split described above has only

In refusing to consider the Sentencing Commission's Report, the Sixth Circuit mistakenly assumed that in making heartland determinations, "U.S.C. § 3553(b) limits our consideration to the guidelines themselves, the official commentary and the policy statements." App., *infra*, 36a. Yet, while the Sentencing Commission cannot alter the content of the Guidelines by issuing a report to Congress, there is *nothing* in § 3553(b) that prevents courts from relying on any relevant source in determining whether conduct is "atypical."

The Sixth Circuit's reading of § 3553(b) also cannot be squared with this Court's admonition in *Koon* that "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98. Section 3553(b) cannot plausibly be read as limiting the sources a sentencing court can look to in gauging its "vantage point" and "day-to-day experience in criminal sentencing." Indeed, if the Sixth Circuit's holding is left to stand, the "refined assessment" required by *Koon* would be rendered a meaningless formality.

For all of the foregoing reasons, the Sixth Circuit's sentencing holding should be reversed.

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deepened. It is in just such cases, where the Commission is the least likely to resolve the conflict among the courts of appeals, that Supreme Court review is needed the most.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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